United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2030 B Pts.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re Grand Jury Subpoena	:	
of	:	No. 75-2030
ALPHONSE PERSICO,	:	
Appellant.	:	

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Statement

Alphonse Persico respectfully appeals to the United States Court of Appeals for the Second Circuit from an order of the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York, entered February 7, 1975, holding the witness Persico in civil contempt under 28 U.S.C. §1826 for failure to testify in a grand jury.

BACKGROUND

The appellant Persico had been subpoenaed to appear before this same grand jury in February 1974. He refused to respond to some of the grand jury's questions on the ground that the questions put to him were the result of unlawful electronic surveillance. He was adjudged in civil contempt under 28 U.S.C. §1826(a) and ultimately served a period of 60 days'

incarceration. The details of those proceedings are reflected in the opinion of this Court affirming his contempt citation. In re Persico, 491 F.2d 156 (2d Cir. 1974). Generally, however, it was admitted by the government that Mr. Persico's home had been electronically eavesdropped for a period of three months during 1973. The government further admitted that some of the questions asked of Persico were the result of interceptions obtained through that bug. The government produced for in camera inspection by Judge Judd the warrants and supporting affidavits for the electronic surveillance. The government did not admit or deny the electronic surveillance of Persico at any other place.

THE INSTANT PROCEEDINGS

After certiorari had been denied in In re Persico, the government again subpoenaed the witness to appear before the same special organized crime grand jury. Counsel filed a motion seeking inter alia that the government file an affidavit pursuant to 18 U.S.C. §3504 affirming or denying electronic eavesdropping with respect to several named places in which Persico has a proprietary interest or is known to frequent (pp. 2-3 of affidavit in support of motion, a copy of which is reproduced in appellant's appendix). Counsel also sought an order requiring the government to affirm or deny, pursuant to 18 U.S.C. §3504, whether the witness's attorney, Nancy Rosner, was subjected to electronic eavesdropping. Counsel also sought an order requiring the Strike Force attorneys to demonstrate their lawful authority to

conduct the investigation, relying on the recent decision in United States v. Williams, ___ F. Supp. ___ (W.D. Mo. Nov. 15, 1974), 16 Cr.L.Rptr. 2223.*

The government responded in affidavits (reproduced in appendix). Argument took place in open court, and Judge Judd denied the various motions, indicating his reasons (Minutes of Feb. 5, 1975, pp. 50a-58a). He then ordered Persico to testify. The witness was brought before the grand jury, given immunity, and refused to testify. The government then applied to the court to hold Mr. Persico in contempt. A brief hearing was held on February 7, 1975, at which time the court adjudged Persico in contempt, but granted a stay in order to allow an application for a stay to be made to this Court. The motion for a stay was denied on February 11, 1975 without prejudice to renew the issues on the appeal.

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* After the order in this case, three Southern District decisions were rendered on this issue, resulting in a conflict in holdings. These decisions, United States v. Crispino (Judge Werker); United States v. Brown (Judge Pollack); and Sandello v. Curran (Judge Tenney) are discussed in full, infra.

POINT I

THE APPOINTMENT OF THE SPECIAL ATTORNEY WHO CONDUCTED THESE PROCEEDINGS WAS NOT IN ACCORDANCE WITH THE LAW AND IS THEREFORE INVALID

Introduction

In a number of recent cases, most importantly, United States v. Williams, ___ F. Supp. ___ (W.D. Mo. Nov. 15, 1974) 16 Cr.L.Rptr. 2223; United States v. Crispino, ___ F. Supp. ___ (S.D.N.Y. Feb. 13, 1975), No. 74 Cr. 932 (HFW); United States v. Brown, ___ F. Supp. ___ (S.D.N.Y. Feb. 25, 1975), No. 74 Cr. 867 (MP); and Sandello v. Curran, ___ F. Supp. ___ (S.D.N.Y. Feb. 27, 1975) No. M-11-188 (CHT), the validity of the appointment of special strike force attorneys has been questioned. In both Williams and Crispino indictments in pending strike force cases have been dismissed, in Williams because the government failed to comply with a court order directing the discovery of documents of authorization to special attorneys, and in Crispino because the letter of authorization was not "sufficiently specific" to meet statutory requirements.* In Brown, however, Judge Pollack disagreed with the conclusions of Williams and Crispino and denied motions to dismiss the indictments, holding that the appointment of the special attorney was proper, while in Sandello Judge Tenney, agreeing with Brown, denied a motion to quash a subpoena of a grand jury witness who argued that the special attorney was not authorized to appear before the grand jury.

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* More precisely, the indictment in Crispino was dismissed because an unauthorized person (i.e., the invalidly appointed special attorney) was present in the grand jury.

In each case, the special attorney was appointed through a form letter signed by Assistant Attorney General Peterson.* In Williams the court strongly suggested that only the Attorney General, and not an Assistant Attorney General, could make such an appointment, since the authorizing statute, 28 U.S.C. §515, requires the special attorney to be "specially appointed" and "specifically designated" "by the Attorney General." In Crispino the court found that Peterson had been properly delegated the authority to appoint the special attorney, but held that the form letter of authorization was inadequate since it failed to specify the special types of cases which the special attorney was commissioned to deal with.

It is appellant's contention that both of these grounds require this Court to hold that special attorney Del Grosso was not authorized to act for the United States or to appear before the special grand jury in the Eastern District of New York.

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* As pointed out in Crispino, supra, at 22, the form letter considered in Williams was used until about May 18, 1972. Thereafter, the specific form letter found defective in Crispino became standard and it is the Crispino type of form letter which Special Attorney Del Grosso received in this case. A copy of his commissioning letter is reproduced in appellant's appendix.

A.

The Appointment of the Special Attorney by Assistant Attorney General Peterson was not in Accordance with the Law, Since Only the Attorney General is Authorized by Statute to make such Appointments

It was essentially the government's position in Williams, Crispino, Brown, Sandello and at the hearing below, that 28 U.S.C. §515(a) gave Assistant Attorney General Peterson authority to appoint special attorneys, since under 28 U.S.C. §510 the Attorney General may authorize any employee of the Department of Justice to perform any function of the Attorney General. 28 U.S.C. §515, the statute under which the appointments are made, states that any officer of the Department of Justice "or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the attorney general, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings...." The government also pointed to CFR Title 28 §0.55 of subpart K, which assigns to the Chief of the Criminal Division, subject to the supervision of the Attorney General, various matters, including "coordination of enforcement activities directed against organized crime and racketeering," (the section to which the special attorney in this case is assiged) and to CFR Title 28 §0.60, subpart K, relating to designation of attorneys to present evidence before the grand jury.

It is the appellant's contention that Section 515 contains specific and restrictive language. It requires that any

attorney appointed to conduct legal proceedings must be "specially appointed" and "specifically dir[illegible]ed" "by the Attorney General." The general language of Section 510 is thus limited by the specific and restrictive language of Section 515. In this regard, of course, the United States Supreme Court, in United States v. Giordano, 94 S.Ct. 1820 (1974) and United States v. Chavez, 94 S.Ct. 1848 (1974) held that the statute empowering the Attorney General or any Assistant Attorney General specially designated by him to authorize application for electronic surveillance under 18 U.S.C. §2516 operates "as a limit" on the language of §510. The appellant thus contends that the language of §515 ("specially appointed" and "specifically directed" "by the Attorney General") limits the general power of delegation conferred under Section 510, and that, therefore, the appointment of the special attorneys in this case by Assistant Attorney General Peterson was invalid. Accordingly, since the special strike force attorney was not properly appointed, he was not authorized to conduct the instant grand jury proceeding. Also see, United States v. Goldman, 28 F.2d 424, 430 (D. Conn. 1928); United States v. Rosenthal, 121 F. 862, 866 (Cir.Ct. S.D.N.Y. 1903).

Furthermore, with regard to the provisions of subpart K of Chapter I (0.55 of 28 CFR) we would initially point out that the section as originally promulgated read in pertinent part as follows:

> Subject to the general supervision and direction of the Attorney General, the following described matters are assigned....

This original promulgation is reflected as Order Number 432-69, 34 CFR 20388, at 20399, enacted December 31, 1970. On October 26, 1973, by virtue of Order Number 543-73, 38 CFR 29585, this preamble language was amended to read as follows:

> Subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General, the following described matters are assigned.... (Emphasis supplied)

Thus, by virtue of this amendment, the Assistant Attorney General in charge of the Criminal Division was to receive the delegation of power involved therein, not only subject to the general supervision of the Attorney General, but under the direction of the Deputy Attorney General as well. Nowhere do the letters of appointment from Henry E. Peterson to special attorneys reflect any direction from the Deputy Attorney General.

Thus, appellant contends that the power conferred upon the Attorney General by §515(a) cannot be delegated. Assuming, arguendo, however, that §510 does permit such a delegation, the alleged codification of that delegation contained in subpart K of Chapter I, §0.55 has not accomplished that end which the government would apply to the instant situation since the appointment of the special attorneys herein was not "under the direction of the Deputy Attorney General" as those regulations specifically require.

Additionally, the government's reliance upon subpart K of Chapter I, §0.60 is self-contradictory. For this section was not promulgated until July 13, 1972 by Order Number 487-72, 37 CFR 13695. If, as the government would contend, the powers of the Attorney General under §515(a) have been delegated to the Assistant Attorney General in charge of the Criminal Division by virtue of §510 (and codified in subpart K of Chapter I of 28 CFR) why was it necessary to add the provisions of §0.60 two years later? For the provisions of §515(a), in its reference to what an attorney specially appointed and specifically directed thereunder may do, specifically includes grand jury proceedings; why, therefore, if the government's contention is correct, was it necessary to add §0.60 which allows the Assistant Attorney General in charge of the Criminal Division to designate attorneys to present evidence to grand juries?

The appellant contends that subpart K of Chapter I of 28 CFR merely delegates to the Assistant Attorney General in charge of the Criminal Division the responsibility of conducting, handling, or supervising those specified criminal violations utilizing duly appointed United States Attorneys and their assistants, as distinguished from the utilization and appointment of "Strike Force Special Attorneys," still subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General.

Additionally, as noted in Giordano and Chavez, it was a practice in the Justice Department for authorizing signatures

to be signed by someone other than the person purporting to sign the authorization. Since counsel is unfamiliar with the signature of Henry Peterson, we would also ask that the government make available true examples of Mr. Peterson's signature to compare them with the signature on the letter appointing the special attorneys in this case. See, Crispino, supra, n. 4.

B.

Even if Assistant Attorney General Peterson had been Properly Delegated the Power to Appoint Special Attorneys, the Special Attorney in this Case was Not Properly Appointed

In United States v. Crispino, ___ F. Supp. ___ (S.D.N.Y. Feb. 13, 1975) No. 74 Cr. 932 (HFW), Judge Werker considered in full the problems associated with the appointment of special attorneys. Although Judge Werker disagreed with the implication in Williams that Assistant Attorney General Peterson had not been properly delegated the power to appoint special attorneys, he nevertheless dismissed the indictment in Crispino on the ground that the actual appointment of the special attorney in the Southern District strike force was itself improperly carried out. In a comprehensive and scholarly opinion, Judge Werker found that the commission letter from Peterson authorizing the special attorney to investigate and prosecute "violations of federal criminal statutes by persons whose identities are unknown to the Department at this time," was clearly not a "sufficiently specific" commission to meet statutory requirements. Rather, it sought to authorize "a roving commission" in complete disregard of the intent of Congress.

Initially, Crispino points out that Congress authorized the appointment of United States Attorneys in each district to prosecute federal crimes. The appointment of special attorneys was first authorized in 1861 upon certification that the services to be performed by the special attorney could not be performed by the Attorney General or some other Department of Justice personnel. In United States v. Rosenthal, 121 F. 862 (Cir.Ct. S.N.Y.S. 1903) it was held that the appointment of special attorneys was limited to trying cases and did not extend to grand jury appearances. As a direct consequence of Rosenthal Congress passed what is now 28 U.S.C. §515(a) authorizing special attorneys to conduct legal proceedings, including grand jury proceedings "when specifically directed by the Attorney General." The legislative history of this section, as discussed in Crispino, shows clearly that special attorneys were intended to be used to prosecute particularly important cases or special cases. Since the United States Attorney generally had the responsibility of prosecution, the appearance of the special attorney was "limited to special cases where the Attorney General concluded that the particular knowledge and skill of these special attorneys would be useful." Crispino, at 11.

Because of the restricted scope of the special attorney's employment, a number of cases soon arose inquiring into whether the commission of the special attorney "had to specify (1) the case(s) to be investigaged; (2) the district(s) in which the investigation was to take place; and (3) the statute(s) which

was to be the basis for the indictment against the defendant." Crispino, p. 11. Furthermore, it was held in United States v. Huston, 28 F.2d 451, 454 (N.D. Ohio 1928) that it was the language of the letter ostensibly commissioning the special attorney which was in fact the "specific direction" of the Attorney General.

In United States v. Goldman, 28 F.2d 424 (D. Conn. 1928) it was then held that the letter

> must designate the specific case or cases to which the employment relates and the district or districts to which it extends. If this were not so, it would follow that the Attorney General of the United States could...issue a roving commission without any limitations, extending to every district in the United States and embrace all criminal investigations.
>
> 28 F.2d at 430

In United States v. Morse, 292 F. 273 (S.D.N.Y. 1922), however, the appointment of a special attorney to investigate persons engaged in the sale of stock of certain named corporations under certain specified statutes later blossomed into other cases not specifically covered by the letter. The court held the appointment valid because the original designation had been as specific as possible. Morse thus adopted a test, also adopted by Judge Werker in Crispino, "whether the designation as counsel which he received from the Attorney General was sufficiently specific." Morse, supra, at 275; Crispino, supra, at 13 (Emphasis in Crispino). In Crispino, Judge Werker summed up his findings as follows:

> The legislative history of Section 515(a) and the cases analyzed in this opinion show that it is not necessary to specify in the commission letter all the defendants who may be indicted, or all the cases which are pending, or all the statutes which may be violated for the statute should be given an interpretation that is helpful to the prosecution of cases by the government. But the one element that is common to every case which has either upheld or dismissed challenges to the authority of special attorneys to appear before grand juries is that the commission letter at least described particularly the type of cases (e.g., "Lands Division" cases in United States v. Hall, 145 F.2d 781 (9th Cir. 1944) that the special attorneys were to present to grand juries.
>
> Crispino, at 21

Addressing the issue of whether the form authorization letter to the special attorney in Crispino met the "sufficiently specific" test, Judge Werker concluded that it obviously did not. In the first place, the letter designates that the special attorney is authorized to conduct proceedings involving violations of "federal criminal statutes." This was not only not specific, "it is precisely the opposite. It is as broad and as vague as possible. Nowhere in the commission is there any attempt to give a description of the type of cases -- such as 'organized crime cases.' or 'Lands Division cases,' or 'tax fraud cases,' etc. -- which Mr. Padgett may be commissioned to investigate and present to grand juries." Crispino, at 20. Indeed, in a footnote (n. 38), Judge Werker points out that even a designation such as "organized crime cases" would itself raise a serious issue of lack of specificity, since, as has been held in

New York in People v. Ron-Ore Soil Systems, ___Misc.2d___(Sup. Ct. Onandago Co. Jan 21, 1975) which held a state organized crime task force unconstitutional, the term "organized crime" is vague and not readily defined. In any event, Judge Werker found that "it is of little consequence that the indictment presented by Mr. Padgett to the grand jury concerned an 'organized crime case, for no mention of 'organized crime' cases was made in his commission. It is the assertion of authority by the Attorney General in issuing the broad and sweeping commission that cannot stand." Crispino at 23.

Summing up the infirmities in the appointment of the special attorney, Judge Werker concluded:

> The commission letter issued to Mr. Padgett is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supersede the local United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any cases involving a violation of a "federal criminal statute." Congress never intended to give such a broad authority when it passed the Act of 1906 even if the statute be for the "protection of the United States," and no case construing that statute supports such a proposition.
>
> Moreover, the practice of a number of Attorney Generals for at least 50 years had been to make the commission letter as specific as possible so as to comply with the intent of Congress. Such a longstanding policy of construction by a number of Attorney Generals cannot be overlooked."

Crispino, supra, at 21-22

In Brown and Sandello, however, Judges Pollack and Tenney disagreed with Judge Werker's conclusions, holding instead that the strike force must be able to investigate any kind of violation in order that its prosecution of organized crime be unfettered.

Thus, as Judge Pollack wrote, "while the appointment of single special prosecutors....may have been appropriate in the early years of this century, by the latter part of the 1960's conditions had clearly changed." A "broad grant of power" was therefore "considered necessary by the Department of Justice." Brown, at p. 7

This view, however, was anticipated and answered by Judge Werker in Crispino, who recognized the reasons of the Justice Department but held that the proper way to accomplish this end would be to amend 515(a). For as the law now stands, it does not permit the establishment of such a "broad roving commission" by twisting the language and intent of 515(a) out of the shape that judicial, legislative and executive authorities have all given to it.

> "Undoubtedly, the Attorney General of the United States has a serious and difficult responsibility in combating "organized crime." If he feels that the local United States Attorneys and their regular assistants cannot be as effective in the prosecution of "organized crime" cases as special attorneys, then he should be able to appoint special attorneys with particular knowledge and skill to prosecute those cases and present them to the grand jury. That is precisely why

Congress passed what is now Section 515(a). But that power is limited to such specialized areas as cases against "organized crime" and was never meant to extend to the prosecution of any case which involved a violation of "a federal criminal statute." If the Attorney General felt that the commissions to his special attorneys would be unduly restrictive if they were limited to "organized crime cases" or "Lands Division cases," etc., then he should have asked Congress to amend section 515(a). He had no authority to issue a broad roving commission such as the one given to Mr. Padgett with its complete lack of any specific direction." Crispino, at pp 22-3.

"This court is aware of the impact this decision may have upon the special attorneys already designated by the "blanket commissions," and the cases already presented to grand juries by those attorneys. However, Congress has placed certain limitations and requirements on the appointment of special attorneys, and these conditions have not changed in almost seventy years despite an attempt at amendment of the Act. The intent of Congress cannot be changed by the unilateral act of the Attorney General. The importance of requiring a department to adhere to the letter of the enabling legislation is basic to the preservation of the balance between the branches of our government. Recent events have shown that abuse results when that rule is not observed." Crispino at pp. 23-4.

POINT II

THE GOVERNMENT'S AFFIDAVITS DID NOT COMPLY WITH THE REQUIREMENTS OF 18 U.S.C. §3504

Prior to appellant's appearance before the grand jury counsel requested the government to supply an affidavit pursuant to 18 U.S.C. §3504 affirming or denying the occurrence of unlawful electronic surveillance. Specifically requested was a check with all federal agencies for Mr. Persico's name, various premises in which he has a proprietary interest and which he frequents (the latter category of locations being specifically denominated) and a check for electronic surveillance of Mr. Persico's attorney. This last request was premised upon the fact that there were communications with counsel on November 25 through 17, 1974, and Mr. Persico was subpoenaed to appear before the grand jury on November 17, 1974. Persico believed his subpoena to have been the result of the interception of those conversations.

One of the premises specifically denominated was the Diplomat Bar. During a brief appearance before the grand jury on December 4, 1974, Mr. Persico was asked whether he had ever been at the Diplomat Bar. He was then asked whether he had ever spoken with Thomas DiBello while he was at West Street. In fact, Persico had conversed with DiBello over a phone in the Diplomat Bar on Thanksgiving Day 1974. Therefore, Persico believed that question to have been the result of the electronic interception of that conversation; hence, the Diplomat Bar was among those premises requested to be checked for electronic surveillance. In response, the government filed three affidavits.

The first affidavit by James W. Dougherty, sworn to January 28, 1975, averred that "The government is prepared to state at a hearing on this motion that not one unauthorized electronic surveillance of the witness occurred at any known premises in which he enjoys a proprietary interest; and that at no time did the government intrude upon communications between the witness and his attorney Nancy Rosner."

Thus, this initial affidavit did not address itself to interceptions of the witness' voice, nor interceptions privileged under the attorney-client privilege or the Sixth Amendment, nor did it set forth those federal agencies whose files were checked to provide the basis for the declarations made.

The second affidavit by Robert DelGrosso, sworn to February 5, 1975 reiterated the existence of electronic surveillance in the form of the bugging of Persico's home between March 1973 and May 1973, which had been revealed in connection with his earlier appearance before the grand jury (see In re Persico, supra). That statement purported to be based on the contents of the Department of Justice files and concerned itself only with surveillance by the Federal Bureau of Investigation.

In addition, for the first time it disclosed that Persico had been the subject of a wiretap conducted by the New York City Police Department during November and December 1972, the results of which were turned over to the federal government.

This affidavit again reiterated that no other surveillance of Persico or premises known to be owned, leased or

licensed by him had been surveilled by the Federal Bureau of Investigation. With respect to other agencies of the federal government such as the Internal Revenue Service, the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco and Firearms and the Bureau of Customs, the affidavit alleged that the files revealed no interception of Persico. However, the affidavit glaringly omitted any answer with respect to premises in which Persico had a proprietary interest, including his own home, nor was there a check for any of the specifically denominated premises which Persico is known to frequent, such as the Diplomat Bar. The government's rationale for omitting a check of any premises was that Persico would have standing only with respect to the interception of his own voice, a postulate clearly at odds with the law, since a proprietary interest in a premises would confer standing on him with respect to anyone's conversations intercepted there. This affidavit was also defective in that it failed to report the results of a check for electronic surveillance of Persico's counsel. See, Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). Still a third affidavit by Mr. DelGrasso was filed on February 7, 1975 which related that the 1972 surveillance of Persico occurred in connection with the wiretaps passed upon by this Court in United States v. Cirillo, 499 F.2d 872 (2d Cir. 1974).

Section 3504 provides:

§3504. Litigation concerning source of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer,

agency, regulatory body, or other authority of the United States --

> (1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

Section 3504(b) defines unlawful act as:

> (b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

The purpose of Section 3504 was to make available to "aggrieved persons" information concerning electronic surveillance which, except for disclosure by the government, would be unobtainable. The purpose of such disclosure was to make possible their utilization of other provisions of the wiretap statute, such as civil remedies, criminal sanctions, motions to suppress, and, of course, the right of a grand jury witness to refuse to give testimony embodied in 18 U.S.C. §2515.

This relationship is clearly recognized in Gelbard v. United States, 408 U.S. 41 (1972). Indeed, the very language of §3504(a)(1) defining "unlawful act" includes "the use of electronic" surveillance in violation of the statute. Section 2515 precludes such unlawful use before a grand jury. Thus, there can be no doubt that in the context of a §3504 claim by a grand jury witness the prosecutor's response must be sufficient to inform the prospective witness whether he has just cause to refuse to testify within the meaning of §2515.

An adequate response to such a request has three elements. First, the prosecutor must disclose the existence of electronic surveillance, whether or not it was pursuant to court order. See, In re Horn, 458 F.2d 468 (3d Cir. 1972). This is clearly required by this Court's holding in In re Persico, supra, requiring in camera inspection of such orders by the district court.

Second, the prosecutor must disclose whether the witness' conversations were intercepted and whether the premises in which he has a proprietary interest were the object of electronic surveillance. Third, the prosecutor must disclose whether such surveillance of the witness will be "used" to question the witness. See, In re Persico, supra. The answers to all three questions are within the sole and exclusive possession of the prosecution. The answers to all three questions are indispensable to the witness' informed decision on whether or not to rely upon §2515 and refuse to give testimony. The case at bar is an excellent example of the correctness of these propositions.

Here, the prosecutor's response was defective in three respects:

1. It failed to respond concerning interceptions of premises, including appellant's home, in which he had a proprietary interest, by any agency except the Federal Bureau of Investigation.

2. It failed to respond concerning interceptions at the Diplomat Bar.

3. It failed to respond concerning interceptions of appellant's counsel.

A §3504 affidavit must respond concerning all premises in which the witness has a proprietary interest. The witness contended in the district court, and the government did not deny, that federal agencies maintain records concerning electronic surveillance in two different indexing systems: by name of person and location. In order to aid the government in fulfilling its §3504 obligation, the witness listed, in his moving papers, the addresses of several locations, including residences, in which he has a proprietary interest.

The government's response revealed only that the Federal Bureau of Investigation records reflected no surveillance at these premises. No other agency was canvassed. The failure to check any other agency is particularly relevant here since, as the DelGrosso affidavit of February 5 disclosed, Persico had been intercepted on a state tap, the results of which were turned over to the Drug Enforcement Administration. This omission is also significant because the former surveillance of Persico involved the bugging of his home during 1973. Although a response with respect to surveillance of his home since that time was specifically requested, none was made.

Under these circumstances, the cases are clear that such an answer is insufficient. See, In re Marx, 451 F.2d 466 (1st Cir. 1971) all appropriate agencies canvassed for electronic

surveillance of premises in which the witness had a proprietary interest whether or not she was present or participated in the conversation. Accord, In re Grumbles, 453 F.2d 119 (3d Cir. 1971); In re Tierney, 465 F.2d 806 (5th Cir. 1972); In re Horn, supra; Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

These same authorities apply to appellant's second contention that the government's response should have included the Diplomat Bar, about which appellant was questioned during his December 4, 1974 appearance before the grand jury. Although not a premises in which he has a proprietary interest, appellant's questioning about his presence there is sufficient to require a response. The government may contend, though it did not in the district court, that such premises are automatically encompassed in a check for interceptions of the witness himself. This position would be untenable since such interception would be indexed by location and not by the name of a person frequenting the location. However, the peculiarities of recording and indexing such information do not preclude government agents from being aware of them or implementing them to question a witness. Thus, where a witness is questioned in connection with a specific location the government has an obligation under §3504 to respond whether there was electronic surveillance of that location.

Finally, appellant contends that the government failed to discharge its obligation to respond whether there had been

electronic surveillance of the witness' counsel violative of his Sixth Amendment right to counsel. The witness alleged that there had been conversations with counsel on November 25 through 27, 1974, that the witness was then subpoenaed on November 27, 1974, and that such interception would have occurred over counsel's office or home phone. Counsel's representation of appellant has been known to the government and the assistant conducting these proceedings at least since the witness' first subpoena in January 1974.

Given this prima facie showing the government had an obligation to affirm or deny the interception. There can be no doubt that a grand jury witness has standing to raise such a right to counsel issue. Beverly v. United States, supra; In re Tierney, supra; United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974).

As the discussion in Alter makes clear, appellant's allegations that his subpoena resulted from interceptions of his counsel were sufficient to require a response:

> We now add some flesh to the bones of the Cohen test. To raise a prima facie issue of electronic surveillance of counsel for a grand jury witness, the affidavit(s) or other evidence in support of the claim must reveal
>
> (1) the specific fact which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
>
> (2) the dates of such suspected surveillance;
>
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;

> (4) the identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
>
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.
>
> When these elements appear by affidavit or other evidence the Government must affirm or deny illegal surveillance pursuant to 18 U.S.C. § 3504(a). (See Beverly v. United States (5th Cir. 1972) 468 F.2d 732.)
>
> The witness does not have to plead and prove his entire case to establish standing and to trigger the Government's responsibility to affirm or to deny. To obtain a hearing he need not identify the electronic intruder as the Government's before he can compel a response. We do insist, however, that he make a prima facie showing that good cause exists to believe that the witness' counsel was subjected by someone to illegal surveillance in connection with the grand jury proceeding in which the witness is involved....

United States v. Alter, supra, at 1026

The government's failure to meet this obligation justifies the appellant's refusal to answer and voids the contempt herein. Indeed, while the government affidavit stated that there was no intrusion upon communications between the witness and his attorney, it significantly failed to state whether "there were overhears of conversations between counsel for the appellants and their clients or with third parties as to matters confidential between attorney and client." Beverly v. United States, 468 F.2d 732, 750, supra, (emphasis supplied). Without a representation as to the interception of confidential communications between counsel and third parties, the government's §3504 affidavit is insufficient.

POINT III

APPELLANT'S COUNSEL SHOULD HAVE BEEN PERMITTED TO EXAMINE THE ORDERS AND SUPPORTING PAPERS AUTHORIZING THE BUGGING OF HIS HOME

Appellant asserts on this appeal, as he did on the appeal from his prior contempt citation, that, as a minimum, counsel should have been permitted to examine the orders and supporting papers authorizing the bugging of his home in order to establish a defense to these contempt proceedings under 18 U.S.C. §2515.

CONCLUSION

For all of these reasons, it is respectfully submitted that the order adjudging appellant in contempt should be vacated.

Respectfully submitted,

ROSNER, FISHER & SCRIBNER

3/3/75

E OF NEW YORK, COUNTY OF New York ss.:

SHERRI FREEMAN being duly sworn, deposes and says: deponent is not a party to the action,

er 18 years of age and resides at Bronx County

☒ Affidavit of Service By Mail — On March 3, 19 75 deponent served the within Brief for Appellant upon U.S. Attorney, EDNY, ED Strike Force attorney(s) for in this action, at 225 Cadman Plaza East, Bklyn, NY the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sherri Freeman

The name signed must be printed beneath

rn to before me on March 3, 19 75.

EUNICE BURNETT
Notary Public, State of New York
No. 31-5531670
Qualified in New York County
Commission Expires March 30, 1976